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THE POLLUTER PAYS PRINCIPLE IN CANADIAN AGRICULTURE

MARIE-ANN BOWDEN*

Ultimately, Canadians will have the environment they deserve.

— Environment Canada¹

I. Introduction

The Polluter Pays Principle (PPP) in Canada is alive, if not well. Enshrined in environmental legislation and touted by the Supreme Court of Canada (SCC) as a principle which “has become firmly entrenched in environmental law in Canada,”² one might assume that the principle has widespread acceptance and adherence among the various sectors of Canadian society, including those engaged in agriculture. Such is not the case.

While the Supreme Court of Canada has expressly adopted the principle, demanding that polluters pay costs of environmental restoration and pollution prevention and control, lower courts have been slow in embracing the PPP. Similarly, although environmental protection legislation at both the federal and provincial levels incorporates the concept, the reference is often veiled and its efficacy is impacted by legislation outside the environmental field which protects selected industries, including agriculture, from application of the principle. Moreover, the statutory manifestations of the PPP which do exist are rarely the subject of prosecution within the agricultural sector.

With respect to policy, the PPP is an accepted norm within the federal government, at least in principle, but there has been little manifestation of the PPP in practice. Agriculture and Agri-Food Canada (AAFC) in particular has been reluctant to articulate the principle in its programs or policies.³ Although the Minister of AAFC stated that “Canadians are increasingly aware of the impact agricultural practices can have on environmental and human health”⁴

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1. See East Rouge Greenway Ass’n, Conservation Quotes 1, http://www.blackhole.on.ca/quotes_1.html (last visited Apr. 4, 2006).

2. *Imperial Oil Ltd. v. Quebec (Minister of Env’t)*, [2003] 2 S.C.R. 624, ¶ 23 (Can.).

3. AGRIC. & AGRI-FOOD CAN., AGRICULTURE IN HARMONY WITH NATURE II: AGRICULTURE & AGRI-FOOD CANADA’S SUSTAINABLE DEVELOPMENT STRATEGY 2001-2004, at ii (2001), available at http://www.agr.gc.ca/policy/environment/pubs_sds_e.phtml.

4. *Id.*

and, as a consequence, prepared a national strategy for sustainable development within the sector,⁵ the strategy made no reference to the PPP.⁶

In addition, AAFC and provincial departments of agriculture face differing views from outside of government as to the meaning of the principle. For example, some farm lobby groups promote alternatives which, although supportive of sustainability, maintain that farmers should be financially supported for positive environmental outcomes.⁷ The question of whether this would simply encompass improved environmental outcomes, also known as the “provider gets principle,”⁸ or shield farmers from internalizing costs associated with their own environmentally degrading activities — a repudiation of the PPP — is not abundantly clear in the literature.⁹

Clearly, in spite of diversity among stakeholders, with a commitment to environmental sustainability comes recognition of both collective and individual responsibility. There is no doubt that the PPP, while not a catch phrase within the industry, is a principle the vast majority of those engaged in the agricultural industry will soon embrace. At present, we must attempt to draw the PPP into agriculture through environmental law reference points and back-ending initiatives such as environmental farm planning,¹⁰ which implicitly support the principle.

This article will highlight the application of the PPP in Canadian agriculture by canvassing the state of the PPP in Canadian case law as well as federal and provincial legislation within and without the agricultural field. Other regulatory and policy instruments which embrace the PPP will also be examined. Part II discusses Canadian PPP law on a national level, and Part III addresses the connection between the PPP and environmental law. Part IV discusses the importance of agriculture to the Canadian lifestyle and economy, and how the PPP relates to them. Part V discusses existing policies, programs,

5. *Id.*

6. *See id.*

7. *See infra* Part V.C.

8. According to the provider gets principle, the producer would receive government support for activities that help to improve the environment above baseline environmental protection measures necessary to avoid harm. *See* Margaret Rosso Grossman, *Agriculture and the Polluter Pays Principle: An Introduction*, 59 OKLA. L. REV. 1, 4, 19, 36-37, 48-50 (2006).

9. *See infra* Part V.C.

10. Environmental farm planning is a process wherein individual farmers develop a voluntary and confidential environmental farm plan to “systematically identify environmental risks and benefits from their own farming operation, and to develop an action plan to mitigate the risks. The EFP process allows farmers to set priorities for actions which address on-farm environmental concerns, as well as those which serve the public interest.” Agric. & Agri-Food Can., *The National Environmental Farm Planning Initiative* (Dec. 21, 2005), http://www.agr.gc.ca/env/efp-pfa/index_e.php.

and laws which serve to defeat the success of the principle. Finally, Section VI assesses the prognosis for the PPP.

II. The Polluter Pays Principle in National Law

A. The Impact of International Formulations of the Principle

For an international instrument to have direct legal effect in Canada, it must be incorporated into domestic law through statute.¹¹ The domestic law must be passed in accordance with the division of powers and thus within the constitutional mandate of the appropriate level of government.¹² The SCC has used Canada's international commitment to environmental principles to justify environmental legislation. In *The Queen v. Hydro-Quebec*,¹³ for example, the court endorsed the preamble to the Canadian Environmental Protection Act which recognizes that Canada "must be able to fulfill its international obligations"¹⁴ by stating that "[p]rotection of the environment is an international problem that requires action by government at all levels."¹⁵ Even in the absence of such incorporation, according to the DeMarco and Campbell, Canada's reliance upon international environmental law and policy (IELP) has provided a springboard for judicial reasoning at the Supreme Court level.

[I]n nearly all of the recent leading SCC cases on environmental law (none of which actually concerned an international law issue directly), the SCC's decisions on domestic environmental laws have been grounded in a wider context — one that is often influenced by IELP.

One of the main reasons that the SCC is able to draw on IELP as frequently as it does is that it is now well accepted in Canada for the courts to use unimplemented international treaties as an interpretive aid when construing domestic legislation.¹⁶

11. See Jutta Brunnée & Stephen J. Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts*, 2002 CANADIAN Y.B. OF INT'L L. 3, 22-23.

12. Jerry V. DeMarco & Michelle L. Campbell, *The Supreme Court of Canada's Progressive Use of International Environmental Law and Policy in Interpreting Domestic Legislation*, 13 REV. EUR. COMMUNITY & INT'L ENVTL. L. 320, 321 (2004), available at <http://www.blackwell-synergy.com/doi/abs/10.1111/j.1467-9388.2004.00412.x>. Although true in the case of implementation of treaties, according to DeMarco and Campbell, "[t]here has been some debate as to whether customary international law requires transformation to have legal effect." *Id.*

13. [1997] 3 S.C.R. 213 (Can.).

14. Canadian Environmental Protection Act, 1999 S.C., ch. 33 pmbl. (Can.).

15. *Hydro-Quebec*, [1997] 3 S.C.R. at 215.

16. DeMarco & Campbell, *supra* note 12, at 321. Also, "[t]here is a general common law principle that Parliament is presumed not to enact domestic law that is in breach of an

Such was the case in *Imperial Oil Ltd. v. Quebec (Minister of Environment)*¹⁷ where, in addition to the provincial legislative provision applicable in the case, the Supreme Court of Canada canvassed other domestic laws incorporating the PPP and then turned to the Rio Declaration on Environment and Development.¹⁸ Principle 16 of the Rio Declaration on Environment and Development was used as an interpretive tool to lend further support to the PPP objective of the legislation.¹⁹

The Supreme Court is not alone in its willingness to look at international law as a means of justifying Canadian legal and policy objectives; the impetus for legislation embracing sustainable development in this country sprang from the Brundtland Report,²⁰ prior to formal recognition of the sustainable development and the PPP by the Courts. However, it is the Supreme Court which has

been consistent in its use of IELP as a source of interpretive guidance. Despite the absence of explicit international law questions before the Court and the fact that relevant IELP is often only brought to the Court's attention by public interest interveners (as opposed to the main parties), the SCC has not hesitated to draw on IELP in resolving domestic legal issues. Eschewing a myopic view, the SCC has opted for a much more globally informed approach to deciding environmental law issues of public interest brought before it.²¹

Decisions at the provincial court level have applied the PPP, but do not make explicit reference to it as a norm of international law.²² In practice,

international treaty." *Id.*

17. [2003] 3 S.C.R. 624 (Can.).

18. *Id.* ¶ 23.

19. *Id.* ¶¶ 23-24. Principle 16 reads "National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment." U.N. Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

20. World Commission on Environment and Development, June 8-19, 1987, *Our Common Future*, U.N. Doc A/42/427 (June 16, 1987).

21. DeMarco & Campbell, *supra* note 12, at 330.

22. In the provinces of Alberta and Ontario, for example, see *McColl-Frontenac Inc. v. Alberta (Minister of Env't)* [2003] 336 A.R. 234 (Alta. Q.B.); *In re Anvil Range Mining Corp.*, [2001] 25 C.B.R. (4th) 1 (Ont. Super. Ct. of Justice [Com'l List]); *United States v. Friedland*, [2001] 40 O.R. (3d) 747 (Ont. Ct of Justice, General Div.); *Fenske (c.o.b. Glombick Farms) v.*

lower level courts have not embraced international law, treating such customary norms as exotic and not of practical application.

B. The Constitutional Context

Canada's constitution divides powers between the federal and provincial governments.²³ Section 91 of the Constitution Act, 1867 articulates those heads of power exclusively assigned to the federal government as including defense and foreign policy, trade, and Indians and Indian lands.²⁴ Parliament is also granted the residual power "to make [l]aws for the [p]eace, [o]rder and good [g]overnment of Canada,"²⁵ as well as the exceptional right "to disallow provincial legislation, and to declare local undertakings to be for the general advantage and thus to fall under federal jurisdiction . . ."²⁶ Provincial powers under section 92 of the Act include authority over "[l]ocal [w]orks and [u]ndertakings,"²⁷ which include education,²⁸ property,²⁹ civil rights,³⁰ natural resources,³¹ and "[m]atters of a merely local or private [n]ature" occurring within the province.³²

Jurisdiction over agriculture and the environment are shared areas of constitutional responsibility, although the historical justification for joint management of each is decidedly different.

Alberta (Minister of Env't), [2000] 272 A.R. 247 (Alta. Q.B.), *rev'd*, [2002] 303 A.R. 356 (Alta. Ct. App.); McCain Foods v. Alberta, [2001] 291 A.R. 314 (Alta. Q.B.); Graham v. Alberta (Dir., Chems. Assessment & Mgmt, Envtl. Prot.), [1996] 46 Alta. L.R.3d 51 (Alta. Q.B.); Sarg Oils Ltd. v. Alberta (Envtl. Appeal Bd.), [1996] 185 A.R. 118 (Alta. Q.B.); Kostuch v. Alberta (Dir., Air & Water Approvals Div., Envtl. Prot.), [1996] 182 A.R. 384 (Alta. Q.B.).

23. See Constitution Act, 1867, 30 & 31 Vict. Ch. 3. (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985). Municipalities are wholly creations of the provinces in accordance with section 92(8) of the Act, which grants the province the exclusive right to make laws in relation to "[m]unicipal [i]nstitutions in the [p]rovince." *Id.* § 92. "Indians, and Lands reserved for the Indians" are specifically included within federal jurisdiction by virtue of section 91(24) of the Act. *Id.* § 91. Since 1867 additional rights have been established through the recognition of inherent aboriginal rights, treaty rights, legislative enactment, and constitutional amendment. For a detailed description of the source and extent of these rights, see NATIVE LAW STATUTES, REGULATIONS AND TREATIES (Jack Woodward ed., 2005).

24. Constitution Act, 1867, § 91. For a thumbnail description of the division of powers within the Canadian Constitution, see also Washington: Embassy of Canada, The Constitution Act, 1867 (June 10, 2005), <http://www.canadianembassy.org/government/constitution-en.asp>.

25. Constitution Act, 1867, § 91.

26. Washington: Embassy of Canada, *supra* note 24.

27. Constitution Act, 1867, § 92(10).

28. *Id.* § 93.

29. *Id.* § 92(13).

30. *Id.*

31. *Id.* § 92A.

32. *Id.* § 92(16).

In the case of agriculture, the Constitution Act, 1867, section 95 articulates the shared authority.

In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.³³

“Environment,” on the other hand, is not mentioned in the 1867 Act, mainly because environmental concerns were not at issue at the time of drafting the Canadian constitution. Since confederation, numerous court cases, primarily argued post-1980, have determined that environment is *sui generis* and a shared responsibility that can constitutionally justify legislation by both levels of government under several heads of power.³⁴ Indeed the recent Supreme Court of Canada decision in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson*³⁵ upheld the right of municipalities to enact environmental legislation in accordance with the principle of subsidiarity, so long as such legislation is not in conflict with provincial statutes.³⁶

Similar arguments have been made regarding the desire to promote the role of Aboriginal peoples in environmental management and protection, most particularly those bands who have adopted land claims settlements and self-government agreements.³⁷

As a result, both levels of government — if not all four — are justified in passing legislation or policy for environmental management in general, and incorporation of the PPP in particular.

33. *Id.* § 95.

34. *See* *The Queen v. Hydro-Quebec*, [1997] 3 S.C.R. 213 (Can.); *Friends of Oldman River Soc'y v. Canada (Minister of Transp.)*, [1992] 1 S.C.R. 3 (Can.); *The Queen v. Crown Zellerbach Can. Ltd.*, [1988] 1 S.C.R. 401 (Can.).

35. [2001] 2 S.C.R. 241 (Can.).

36. *Id.* at 273-74.

37. For example, for a discussion of the role of aboriginal people within the context of the Canadian Environmental Protection Act, see KRISTEN DOUGLAS & MONIQUE HERBERT, LIBRARY OF PARLIAMENT, LEGISLATIVE SUMMARIES: BILL C-32: THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999 (July 5, 1999), http://www.parl.gc.ca/common/Bills_ls.asp?Parl=36&Ses=1&ls=C32.

C. PPP in the Canadian Courts

Certainly, most Canadians are aware of the polluter pays principle and accept that society must collectively take steps to safeguard the environment. Further, they believe that those responsible for environmental contamination must remedy their specific problem and prevent further environmental denigration by internalizing all costs associated with achieving that end.³⁸ According to the Supreme Court, the Canadian psyche has gone beyond this basic belief to recognize that Canadian concern regarding environmental protection

does not reflect only the collective desire to protect it in the interests of the people who live and work in it, and exploit its resources, today. [But] [i]t may also be evidence of an emerging sense of intergenerational solidarity and acknowledgment of an environmental debt to humanity and to the world of tomorrow.³⁹

In 2003, the Supreme Court of Canada, addressing the liabilities associated with a contaminated site formerly owned by a large oil company, determined the scope of application of the PPP as described in the province of Quebec's Environment Quality Act.⁴⁰ According to section 31.42 of the legislation,

[w]here the Minister believes on reasonable grounds that a contaminant is present in the environment . . . , he may order *whoever has emitted, deposited, released or discharged, even before 22 June 1990, all or some of the contaminant to furnish him with a characterization study, a programme of decontamination or restoration of the environment describing the work proposed for the decontamination or restoration of the environment and a timetable for the execution of the work.*⁴¹

In interpreting the section, the Court recognized the purpose and effect of the PPP.

To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate

38. See David Boyd, Comment, *Clean Up After Yourself*, GLOBE & MAIL (Toronto), Nov. 5, 2003, at A25. Although Boyd maintains that the PPP is supported in "theory" he argues that practice in Canada is decidedly short in achieving that end.

39. Imperial Oil Ltd. v. Quebec (Minister of Env't), [2003] 2 S.C.R. 624, ¶ 23 (Can.).

40. *Id.* ¶ 25.

41. *Id.* ¶ 14 (citing the Environmental Quality Act, R.S.Q., ch. Q-2, § 31.42 (2005), as it was worded in 1998).

costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.⁴²

In ordering the appellant to remedy the contaminated site, the Minister was, in the opinion of the Court, “performing his functions of management and application of environmental protection legislation” in pursuit of the public interest objective within the organizing principles of the Act.⁴³ The public interest in environmental protection included endorsement of the polluter pays principle.⁴⁴

The decision, believed by many to be the acceptance of the PPP in Canada (as well as the doctrine of intergenerational equity),⁴⁵ still left many unanswered questions as to the scope of the concept and how it might affect other cases.⁴⁶ Subsequent cases have, at a minimum, confirmed the PPP as a statutory principle,⁴⁷ but the judicial scope of the principle is still being divined.

The most recent case to address the scope and application of the principle, *Canadian National Railway Co. v. A.B.C. Recycling Ltd.*,⁴⁸ interpreted the British Columbia Waste Management Act.⁴⁹ The Supreme Court of that province upheld recovery of reasonable legal costs incurred by the plaintiffs,

42. *Id.* ¶ 24.

43. *Id.* ¶ 38.

44. *Id.* ¶¶ 38-39.

45. See Media Release, Sierra Legal Defense Fund, Top Court Upholds Government Powers to Protect Environment (Oct. 30, 2003), available at http://www.sierralegal.org/m_archive/2003/pr03_10_30e.html.

46. See Bryan J. Buttigieg & Michelle Fernando, *The Supreme Court of Canada Endorses the Concept of “Polluter Pays”-But What Does It Mean?*, ENVIRONOTES! NEWSLETTER (Nov. 2003), http://www.millerthomson.com/mtweb.nsf/Web_Newsletter_Display_en?ReadForm&PageID=mtte6a9bkh; CBC News, *Imperial Oil Must Clean Up Site: Supreme Court* (Oct. 30, 2003), http://www.cbc.ca/stories/2003/10/30/scoc_oil031030.

47. See *B.C. Hydro & Power Auth. v. British Columbia (Envtl. Appeal Bd.)*, [2005] 247 D.L.R. (4th) 404 (B.C.A.C.), *rev’g* *B.C. Hydro & Power Auth. v. British Columbia (Envtl. Appeal Bd.)*, [2003] 229 D.L.R. (4th) 1 (B.C.C.A.); *Canadian Nat’l Ry. v. A.B.C. Recycling Ltd.*, [2005] 47 B.C.L.R. (4th) 185 (B.C. Sup. Ct.); *Canadian Env’t. Law Ass’n v. Canada (Minister of Env’t)*, [1999] 3 F.C. 564 (Fed. C.A.); *Workshop Holdings Ltd. v. CAE Mach. Ltd.*, [2005] 40 B.C.L.R. (4th) 382 (B.C. Sup. Ct.); *No. 158 Seabright Holdings Ltd. v. Imperial Oil Ltd.*, [2003] 12 B.C.L.R. (4th) 226 (B.C.C.A.); *Beazer E., Inc. v. British Columbia (Assistant Reg’l Waste Manager)*, [2000] 84 B.C.L.R. (3d) 88 (B.C. Sup. Ct.); *Montague v. Ontario (Dir., Ministry of Env’t)*, [2005] 196 O.A.C. 173 (Ont. Super. Ct. of Justice); *Jones v. Delta (Municipality)*, [1992] 92 D.L.R. (4th) 714 (B.C.C.A.).

48. 47 B.C.L.R. (4th) 185.

49. R.S.B.C., ch. 482 (1996), *repealed by* Environmental Management Act, S.B.C., ch. 53 (2003).

in this case Canadian National Railway Company and Canadian National Railway Properties Inc., from the polluting defendant, on the basis that such costs were consistent with the two underlying principles of the legislation — the polluter pays principle and timely remediation.

Applying a contextual approach, I consider that interpreting “legal costs” in s. 27(2)(c) of the Act to mean indemnity on a solicitor-client or special costs basis would be more consistent with the purpose and scheme of the legislation. The reference in the statute to “all costs of remediation” is used to describe not just legal fees but all costs incurred. The intent of s. 27(2)(c) is to provide indemnity for all costs of remediation reasonably incurred, and must therefore include legal costs.

This approach is more consistent with the underlying principles of the Act — “polluter-pay”, prevention of pollution and deterrence, and speedy remediation of contaminated sites. If an owner knew that it was only entitled to partial recovery of legal costs, which could be quite substantial, it would, in my view, be less likely to incur the expense of remediation if it was only to be partially reimbursed for the cost of recovering those expenses from another. Making responsible parties liable to indemnify legal costs in full also accords with the principle of “polluter-pay” and will serve as a deterrent to pollution. While party-and-party costs may not be inconsistent with the principles of the Act, I conclude that indemnification is more consistent with those principles than party-and-party costs, and is therefore the proper approach.⁵⁰

Similarly, in *Montague v. Ontario (Ministry of the Environment)*,⁵¹ that province’s Superior Court (Division Court), in interpreting the Environmental Protection Act,⁵² began with the premise that the legislation included “both a ‘polluter pays’ and an ‘owner pays’ enforcement mechanism.”⁵³ The case addressed only the scope of these principles; the existence of the principles was a given.⁵⁴

50. *Canadian Nat’l Ry.*, [2005] 47 B.C.L.R. (4th) ¶ 6 (emphasis omitted) (citing *Canadian Nat’l Ry. v. A.B.C. Recycling Ltd.*, [2005] 41 B.C.L.R. (4th) 317, ¶¶ 181-82 (B.C. Sup. Ct.)).

51. 196 O.A.C. 173. The case specifically addressed the ability of the Ministry of the Environment to protect the environment from contamination through the use of a Directors cleanup and discharge of contaminant prevention order. *Id.* ¶ 1.

52. R.S.O., ch. E-19 (1990).

53. *Montague*, [2005] 196 O.A.C. ¶ 1.

54. *See id.* ¶ 22.

D. The PPP in Legislation

In reviewing environmental statutes across Canada, the PPP is found in legislation beginning in the early 1990s.⁵⁵ As noted by the Alberta Environmental Law Centre, “[m]any Canadian [provincial] jurisdictions have legislative provisions requiring persons causing releases into the environment to take steps to control and remediate” the contamination, while other statutes expressly include the polluter pays principle as a fundamental tenet of their environmental legislation.⁵⁶ The Environmental Management and Protection Act (EMPA, 2002) in the province of Saskatchewan is an example of the former.⁵⁷ The EMPA establishes a comprehensive, and somewhat Draconian, scheme to protect and remedy unauthorized discharges into the environment.⁵⁸ Nova Scotia, on the other hand, includes reference to the PPP within the section 2 purposes of its Environment Act.

The purpose of this Act is to support and promote the protection, enhancement and prudent use of the environment while recognizing the following goals: . . .

(c) the polluter-pay principle confirming the responsibility of anyone who creates an adverse effect on the environment to take remedial action and pay for the costs of that action . . .⁵⁹

The adoption of the principle at the provincial level is not particularly surprising considering the position of the Canadian Council of Ministers of the Environment (CCME). On January 29, 1998, the Ministers, with the exception of Quebec, signed the Canada-wide Accord on Environmental Harmonization⁶⁰ “to achieve the highest level of environmental quality for all Canadians” through a framework and mechanisms to achieve that end as well as direct the development of sub-agreements in specific areas of common endeavor.⁶¹ Furthermore, the fourteen Governments adopted a series of principles, stating that their environmental management activities would reflect, among other

55. Cindy Chaisson, *The State of “Polluter Pays” in Canada*, NEWS BRIEF (Envtl. Law Ctr., Edmonton, Alta.), 2005, at 10, 10, <http://www.elc.ab.ca/ims/client/upload/PolluterPays-Vol.20-1.pdf>.

56. *Id.* See, for example, Environmental Protection and Enhancement Act, R.S.A., ch. E-12, § 2(I) (2000) (Alta.); Contaminated Sites Remediation Act, R.S.M., ch. 40, §§ 1(1)(c)(i), 21(a) (1996) (Man.); Environment Act, 1994-95 S.N.S., ch. 1, § 2(c) (N.S.).

57. See 2002 S.S., ch. E-10.21 (Sask.).

58. See *id.* §§ 4-15.

59. 1994-95 S.N.S., ch. 1, § 2 (N.S.).

60. Canadian Council of Ministers of the Environment, *Canada-wide Accord on Environmental Harmonization* (Jan. 28, 1998), http://www.ccme.ca/assets/pdf/accord_harmonization_e.pdf.

61. *Id.* at 1.

principles, that “those who generate pollution and waste should bear the cost of prevention, containment, cleanup or abatement (polluter pays principle).”⁶²

Federal environmental legislation also expressly or implicitly incorporates the PPP in a similar pattern to the provinces.⁶³ Most prominent among the federal references to the PPP is the preamble of the Canadian Environmental Protection Act, 1999, which reads,

Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the “polluter pays” principle; . . .

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: . . .⁶⁴

The PPP is accepted within the Canadian environmental legislation and is slowly trickling down through the court system to lower court decisions.

III. The Polluter Pays Principle and Environmental Law

Currently in Canada, the nexus between the PPP and agriculture lies in environmental legislation and not industry-specific statutes.⁶⁵ Potentially, at least, environmental protection provisions, particularly those dealing with discharges into air, water, and on-land resources, should be applicable to farming operations. A number of federal and provincial statutes incorporate the PPP in a manner that could be applied to agricultural activities in the same manner as it is to other industries.

Section 1(1) of the Environmental Protection Act of Ontario, for example, defines “natural environment” as “the air, land and water, or any combination or part thereof”⁶⁶ and provides, “[n]o person shall discharge into the natural environment any contaminant, and no person responsible for a source of contaminant shall permit the discharge into the natural environment of any contaminant from the source of contaminant, in an amount, concentration or level in excess of that prescribed by the regulations.”⁶⁷

Contaminant is defined as “any solid, liquid, gas, odour, heat, sound, vibration, radiation or combination of any of them resulting directly or

62. *Id.* at 2.

63. *See* Canada Environmental Protection Act, 1999 S.C., ch. 33, pmbl. (Can.); Arctic Waters Pollution Prevention Act, R.S.C., ch. A-12, §§ 6-7 (1985); Fisheries Act, R.S.C., ch. F-14, § 42 (1985).

64. 1999 S.C., ch. 33, pmbl.

65. *See infra* Part IV.

66. Environmental Protection Act, R.S.O., ch. E-19, § 1(1) (1990).

67. *Id.* § 6(1).

indirectly from human activities that causes or may cause an adverse effect.”⁶⁸ The legislation then provides for remedial and preventative orders to address land, water, property, animal life, plant life, or human health or safety that is or is likely to be injured, damaged, or endangered as a result of any such discharge.⁶⁹ The broad scope of the PPP provisions could encompass farm related environmental problems including: pesticide spray drift, fertilizer runoff, soil drift, odours from intensive livestock operations, and green house gas emissions, to name but a few examples. However, with very few exceptions, farmers have not traditionally been targeted for enforcement pursuant to environmental legislation at either the federal⁷⁰ or the provincial level.

According to Saskatchewan Environment officials, there has never been a provincial prosecution of a farmer pursuant to an environmental statute,⁷¹ nor has any agriculturally based project, including intensive livestock operations, required an environmental assessment in the province.⁷² This in a province where approximately 12.6% of the approximately 979,000 residents are farm based, 35.7% rurally based,⁷³ and where the Environmental Management and Protection Act, 2002 represents the most progressive and aggressive environmental legislation in the country.

The federal government, although historically reluctant to prosecute, has made one major exception as of late to deal with “fish kills” caused by agricultural activity. Section 36(3) of the Fisheries Act⁷⁴ prohibits the deposit into fish-bearing waters of substances that are deleterious or harmful to fish. The provision has been used to crack down on pesticide runoff problems,

68. *Id.* § 1(1).

69. *Id.* §§ 17-18.

70. A review of federal environmental enforcement activities under the Canadian Environmental Protection Act and the federal Fisheries Act reveals that of the approximately 170 prosecutions by the department between 1988 and 2001, none related to agricultural activities. Environment Canada, *Environmental Law Enforcement Program, Reports and Statistics, Legal Activities Reports* (Jan. 1, 1988 - Mar. 31, 1999), <http://www.ec.gc.ca/eleale/default.asp?lang=En&n=5C63F879-1>.

71. E-mail from Ralph Bock, Environmental Project Officer, Saskatchewan Environment, to Marie-Ann Bowden, Professor, University of Saskatchewan College of Law (July 10, 2005) (on file with author). Mr. Bock believes that the federal Department of Fisheries and Oceans has considered action against farmers for interference with fish/fish habitat but that, to date, no prosecutions laid in the province. *Id.*

72. E-mail from Larry Lechner, Director of the Environmental Assessment Branch, Saskatchewan Environment, to Marie-Ann Bowden, Professor, University of Saskatchewan College of Law (July 10, 2005) (on file with author).

73. StatsCan, *Farm Population, By Province (2001 Censuses of Agriculture and Population: Saskatchewan)*, <http://www40.statcan.ca/l01/cst01/agrc42i.htm>.

74. R.S.C., ch. F-14, § 36(3) (1985).

particularly in Prince Edward Island.⁷⁵ In 2002 it was reported that there were over 7000 potato fields covering approximately 110,000 acres on the Island.⁷⁶ Improper application practices led to chemical runoff into waterways destroying fish and other aquatic life.⁷⁷ “There have been at least 26 so-called ‘fish kills’ in recent years and 17 rivers have been declared dead throughout the province, meaning virtually all forms of aquatic life in them have been wiped out.”⁷⁸

The rising level of local concern outside of the agricultural community led to more frequent and rigorous prosecutions than there had been to date.

By way of example, in 2004, a fine of \$3500 and a payment of \$12,800 to the federal government’s Environmental Damages Fund were ordered against a Prince Edward Island potato grower who pleaded guilty of a violation under Fisheries Act section 36(3).⁷⁹ This penalty was levied as a result of pesticide contaminated water and soil runoff into a local waterway, which resulted in a count of over 4500 dead fish.⁸⁰ According to the Environment Canada Press Release which documented the judgment,

The Environmental Damages Fund is rooted in the “polluter pays” principle. Courts can use the Fund to ensure that compensation is provided by convicted polluters for the damage that they cause to the environment. The Fund also gives the court a way to ensure that financial penalties imposed under the Canadian Environmental Protection Act, 1999 (CEPA 1999) and the Fisheries Act are used for environmental protection purposes.⁸¹

With this notable exception, the failure to prosecute environmental offenders within the agricultural sector is attributable to two factors. First, environmental legislation is often subordinate to other statutes, including statutes administered by the departments of agriculture. In Saskatchewan, for example, the Environmental Management and Protection Act, 2002 (EMPA,

75. *Perfect Potato: An Environmental Hazard*, Oct. 28, 2002, http://www.pmac.net/perfect_potato.html.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. News Release, Environment Canada, Potato Grower Sentenced in Fish Kill Case (Sept. 21, 2004), http://www.ec.gc.ca/press/2004/040921_n_e.htm. For earlier case reports, see FISHERIES AND OCEANS CANADA, ANNEX 8: ADMINISTRATION AND ENFORCEMENT OF POLLUTION PREVENTION PROVISIONS BY ENVIRONMENT CANADA: REPORT ON FY 2000-2001 ACTIVITIES (Apr. 1, 2000 - Mar. 31, 2001), http://www.dfo-mpo.gc.ca/canwaters-eauxcan/infocentre/publications/reports-rapports/ann00/annex8_e.asp.

81. News Release, Environment Canada, *supra* note 80.

2002) provides that “[t]he Minister is responsible for all matters *not by law assigned to any other minister or government agency respecting the environment and enhancing and protecting the quality of the environment.*”⁸²

The powers of the Minister within the Act include remediation of discharges into the environment⁸³ and the management of surface and groundwater quality.⁸⁴ In spite of these powers, the environmental control of intensive livestock operations (ILO) rests with the provincial Department of Agriculture.⁸⁵ As a result, in the event of “immediate danger of pollution of ground or surface waters” caused by an intense livestock operation (ILO) — through mismanagement of manure, for example — it is the Minister of Agriculture, not the Minister of Environment, who may suspend or cancel approval of a waste management plan.⁸⁶ Moreover, there is no legislative provision within the intensive livestock operations statute which imposes civil liability on the operator should the danger become a reality. At that point the civil liability provisions of the Environmental Management and Protection Act may provide some opportunity for compensation for those harmed by the operation.⁸⁷

Second, certain agricultural activities may specifically be exempt from environmental legislation in certain circumstances. For example, every Canadian province has laws governing the sale, use, transportation, storage, spill, and disposal of pesticides used in agriculture, forestry, commercial, and domestic application.⁸⁸ However, many provinces also exempt farmers from the rules governing pesticide use, including mandatory education and training.⁸⁹

82. 2002 S.S., ch. E-10.21, § 3(1) (Sask.) (emphasis added).

83. *Id.* §§ 4-36.

84. *Id.*

85. Agricultural Operations Act, 1995 S.S., ch. A-12.1 (Sask.).

86. *Id.* § 24(3).

87. EMPA § 15.

88. *See, e.g.*, Pesticide Regulation, 43/1997 (Alta.); Pest and Nuisance Control Regulation, 184/2001 (Alta.); Pesticide Sales, Handling, Use and Application Regulation 24/97 (Alta.); Pesticide Control Act, R.S.B.C., ch. 360 (1996) (repealed 2003) (B.C.); Integrated Pest Management Act, 2003 S.B.C., ch. 58 (B.C.); The Pesticides and Fertilizers Control Act, R.S.M., ch. P40 (1987) (Man.); Pesticides Control Act, R.S.N.B., ch. P-8 (1973) (N.B.); Environmental Protection Act, 2000 S.N.L., ch. E-14.2, § 9 (Nfld.); Environment Act, 1994-95 S.N.S., ch. 1, pt. 7 (N.S.); Pesticides Act, R.S.O., ch. P.11 (1990) (Ont.); Pesticides Control Act, R.S.P.E.I., ch. P-4 (1988) (P.E.I.); Loi sur les Pesticides, L.R.Q., ch. P-9.3 (Que.); The Pest Control Act, R.S.S., ch. P-7 (1978) (Sask.); Pest Control Products (Saskatchewan) Act, S.S., ch. P-8 (1978) (Sask.).

89. These provinces are: Alberta, British Columbia, Saskatchewan, Manitoba, New Brunswick, and Nova Scotia. *See* B.C. Regulations (Pesticide Control Act), 319/81, § 10(2); DAVID BOYD, UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY

IV. The Polluter Pays Principle and Agriculture

A. The Context

According to Agriculture and Agri-Food Canada, yearly sales of goods and services from the Canadian agriculture sector amount to more than \$83 billion. Agriculture and agri-food industries represent almost 9% of the Gross Domestic Product of Canada.⁹⁰ Seven percent of Canadian exports are agriculturally based and amount to a total of about \$17 billion each year, representing employment for about two million Canadians.⁹¹

In keeping with international trends in the developed world, primary agriculture⁹² is increasingly focused on the maximization of commodity production on fewer and larger, specialized farms. “Major commodity groups are grains” (in spite of pricing difficulties) “and oilseeds, red meats” (although the cross-border problems associated with Bovine Spongiform Encephalopathy has been a blow to the industry), “dairy, horticulture, poultry and eggs, and forages.”⁹³ Production has increased only marginally over the past decade, but through efforts to increase value-added production this figure is expected to grow in step with government and sectoral initiatives.⁹⁴

The diversity of agricultural production systems across the country, coupled with the varied factors affecting agriculture in different regions, has led to a corresponding variation in the degree and severity of environmental issues affecting the industry across Canada. AAFC reports that

123 (2003). Similarly, Ontario’s Environmental Protection Act exempts animal waste from provisions prohibiting the release of contaminants. R.S.O., ch. E-19, §§ 6(2), 14(2), 15(2), 91(4) (1990); *see also* BOYD, *supra*, at 37 (citing Waste Management Act, R.S.B.C., ch. 482 (1996) (repealed 2003); Agricultural Waste Control Regulation (Waste Management Act), B.C. Reg. 131/92, § 2).

90. Specifically, 2.1% farm-level agricultural production, 2.3% processing, and 4.3% food service and retail transactions. AGRIC. & AGRI-FOOD CAN., AGRICULTURE IN HARMONY WITH NATURE: STRATEGY FOR ENVIRONMENTALLY SUSTAINABLE AGRICULTURE AND AGRI-FOOD DEVELOPMENT IN CANADA, at 7 (1997)[hereinafter AGRIC. & AGRI-FOOD CAN., AGRICULTURE IN HARMONY WITH NATURE], *available at* http://www.agr.gc.ca/policy/environment/pdfs/sds/strat_e.pdf.

91. *Id.*

92. Primary agriculture generally includes farming in all its branches and specific farming operations such as the cultivation and tillage of the soil; the production of any agricultural or horticultural commodities; and the raising of livestock. For a list of specific activities that constitute “agriculture,” *see* North American Industry Classification System, 1997 U.S. NAICS Codes and Titles (July 1998), <http://www.census.gov/epcd/naicscod.txt>.

93. AGRIC. & AGRI-FOOD CAN., AGRICULTURE IN HARMONY WITH NATURE, *supra* note 90, at 7.

94. *Id.*

The environmental risks of agricultural production also vary significantly as a function of the nature of production, the environment in which production takes place, and the management practices employed. Environmental issues associated with agriculture and agri-food production include use and management of agricultural inputs; use and quality of water resources; management and quality of soil resources; biodiversity in agroecosystems; climate and air quality issues; and management of waste, including food packaging.⁹⁵

For example, agriculturally sourced nitrates are “present in nearly all” ground water beneath the “intensively farmed regions of Canada.”⁹⁶

According to David Boyd, non-point sources are the primary cause of water pollution, with runoff of fertilizers, animal wastes, and pesticides from agriculture acting as major contributors which “continues to flummox our legal system.”⁹⁷ Clearly, if the source of the pollution can be determined — assuming sustainable practices are not being used, or at a minimum, standards of reasonable care are not exercised — the PPP should be applicable. Even so, there are few examples of prosecutions in response to this issue.⁹⁸ In fairness, however, the nature of agricultural pollution as primarily a non-point source has been a major deterrent to regulation and enforcement.⁹⁹

B. Agricultural Legislation and the PPP

Despite the federal government’s commitment to the polluter pays principle, there is no specific reference to the PPP in federal agricultural legislation, nor is there an explicit policy statement adopting the principle. With regard to the former, AAFC officials¹⁰⁰ maintain that the Department itself has little regulatory authority per se. In their opinion, the legislative powers rest with Environment Canada, the Pest Management Regulatory Agency (PMRA), and the Canadian Food Inspection Agency (CFIA).¹⁰¹

In addition, many view Canada as a “guideline” country where federal and provincial governments, reluctant to introduce and enforce legislation, prefer

95. *Id.* at 8.

96. *Id.* The AAFC maintains that these nitrates are “usually within the safe limit.” *Id.*

97. BOYD, *supra* note 89, at 36 (citing ORG. FOR ECON. CO-OPERATION & DEV., ENVIRONMENTAL PERFORMANCE REVIEW: CANADA 203 (1995)).

98. *See supra* note 70 and accompanying text.

99. E-mail from Ralph Bock, *supra* note 71.

100. Interview with an anonymous source within the federal AAFC (July 8, 2005).

101. Although the PMRA and CFIA fall within the Department, both are considered “arms-length” agencies.

instead to work with industry and suggest voluntary guidelines.¹⁰² In Saskatchewan, the Environmental Assessment Act¹⁰³ makes more than sixteen references to regulations which “shall be passed” pursuant to the legislation. Since passage of the legislation in 1980, no regulations have been introduced. Guidelines and policies have been drafted and redrafted to address fundamental issues, including the preparation of project proposals.¹⁰⁴

Another reason for the failure to incorporate the PPP into agricultural regulation is that farmland in Canada is primarily privately owned. The historical sanctity of common law private property rights leaves legislators reluctant to infringe on rural property interests. This is somewhat surprising in that, unlike the United States, there is no explicit constitutional protection of property rights in Canada. Nonetheless, the sentiment is particularly strong in western Canada where, for example, federal Government efforts to pass endangered species legislation, including protection of species habitat, took some twelve years to fully implement after the 1992 signing of the United Nations Convention on Biological Diversity.¹⁰⁵ The long delay was in no small part attributable to the opposition of western farmers to any broad definition of the protected habitat associated with an endangered species.¹⁰⁶ Farmers feared losing control over agricultural property hosting such species. As a result, the Species at Risk Act¹⁰⁷ reflects a more conciliatory approach, which many would argue is ineffective in securing the objectives of the legislation.

The federal government has also consciously chosen to rely on voluntary conservation and stewardship initiatives as the primary approach for habitat protection, especially on private land.

The end result is a law that is largely restricted to federal lands, aquatic species and migratory birds under the *Migratory Birds Convention Act*. The majority of species listed under the Act will

102. See *supra* note 70 and accompanying ext.

103. 1979-80 S.S., ch. E-10.1 (Sask.).

104. ENVTL. ASSESSMENT BRANCH, SASKATCHEWAN ENV'T, GUIDELINES FOR THE PREPARATION OF A PROJECT PROPOSAL (July 15, 2003), http://www.se.gov.sk.ca/environment/assessment/proposal_guidelines_2003.pdf.

105. June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 29, 1993).

106. See, for example, the presentation of the Canadian Cattlemen's Association to the Federal Standing Committee on Environment and Sustainable Development, Nov. 19, 1996 (on file with author). For a full discussion of the arguments presented in opposition to the attempts at federal regulation of endangered species, see LAURA JONES & LIV FREDERICKSON, FRASER INSTITUTE, CRYING WOLF: PUBLIC POLICY ON ENDANGERED SPECIES LEGISLATION IN CANADA (1999), available at <http://www.fraserinstitute.ca/shared/readmore.asp?sNav=pb&id=214>.

107. 2002 S.C., ch. 29 (Can.); see also GOVERNMENT OF CANADA, SPECIES AT RISK ACT: A GUIDE (2003), http://www.sararegistry.gc.ca/the_act/SARA_guide_oct03_e.pdf.

only be protected if they are found on federal land — a mere 5% of Canada outside the territories.¹⁰⁸

Historically, any attempt to “subvert” property rights and regulate farmland through legislative means “must be justified on the grounds that public health or environmental values are jeopardized or affected by agricultural activities. As a result, when grappling with environmental problems caused by agriculture Canada has generally avoided regulatory standards, preferring to use voluntary programs.”¹⁰⁹

There are a few notable exceptions to the general approach. Agriculture accounts for 90% of the pesticides used in Canada, boasting over \$1.4 billion industry sales annually.¹¹⁰ Canada is normally ranked eighth or ninth in the world pesticide market, consuming about 3% of the total product.¹¹¹ According to Statistics Canada, dollars spent on pesticides quadrupled between 1970-1995, with an eighteen-fold increase in land area treated with herbicides.¹¹² About three-quarters of all croplands are treated with pesticides and AAFC studies report that a majority of farmers do not follow recommended practices for applying pesticides.¹¹³ According to David Boyd, at least sixty pesticides approved for use in Canada — including 2,4-D, lindane, and carbofuran — have been banned in other western countries due to environmental and health concerns.¹¹⁴ Within the administration of the Pesticide Management Review Agency (PMRA), the link between pesticides and environmental and human health has led to a more aggressive approach toward pollution prevention and polluter liability than is otherwise evident in AAFC. An example of this approach is the Pesticide Residue Compensation Act¹¹⁵ which provides compensation to farmers who have used a pesticide in

108. KATE SMALLWOOD, SIERRA LEGAL DEFENSE FUND, A GUIDE TO CANADA’S SPECIES AT RISK ACT 5 (2003).

109. BOYD, *supra* note 89, at 112.

110. For a complete analysis of pesticide use patterns in Canada, see REPORT OF THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT, PARLIAMENT OF CANADA, PESTICIDES: MAKING THE RIGHT CHOICE FOR THE PROTECTION OF HEALTH AND THE ENVIRONMENT (May 2000), <http://www.parl.gc.ca/InfoComDoc/36/2/ENVI/Studies/Reports/envi01/04-toc-e.html>.

111. AGRIC. & AGRI-FOOD CAN., REVIEW OF AGRICULTURAL PESTICIDE PRICING AND AVAILABILITY IN CANADA (2003), available at http://www.agr.gc.ca/spb/fiap-dpraa/publications/pesticide/pest1_e.php.

112. BOYD, *supra* note 89, at 115-16.

113. *Id.* (citing AGRIC. AND AGRI-FOOD CAN., MANURE, FERTILIZER AND PESTICIDE MANAGEMENT IN CANADA: RESULTS OF THE 1995 FARM INPUTS MANAGEMENT SURVEY (1998), available at http://www.agr.gc.ca/spb/fiap-dpraa/publications/manfum/rprt_e.pdf).

114. BOYD, *supra* note 89, at 115.

115. R.S.C., ch. P-10, § 3.1 (1985).

accordance with the Pest Control Products Act,¹¹⁶ but whose produce cannot be sold because it would violate the pesticide residue levels established under the Food and Drugs Act.¹¹⁷ The legislation incorporates the PPP in a somewhat backhanded fashion by providing:

5. (1) No payment of compensation shall be made to a farmer under this Act in respect of a loss suffered by the farmer by reason of pesticide residue in or on an agricultural product until the farmer has taken any steps that the Minister considers necessary

(b) to pursue any legal action that the farmer may have against (i) the manufacturer of the pesticide causing the residue in or on the product, or (ii) every person responsible for the presence of the pesticide residue in or on the product

(2) Where he deems it necessary, the Minister may require, as a condition for the payment of any compensation to a farmer under this Act, the consent of that farmer for the Minister to pursue on his behalf any legal action against any manufacturer or person referred to in paragraph (1)(b).¹¹⁸

Whether motivated by economic or more environmentally based sentiments, the section, although not explicitly citing the polluter pays principle as the basis for liability, certainly incorporates the spirit of the PPP. However, even this provision has rarely been applied.

Similarly, although Ontario's Environmental Protection Act exempts animal waste disposed of "in accordance with normal farming practices" from its provisions relating to the discharge,¹¹⁹ notification,¹²⁰ and spill of contaminants,¹²¹ the polluting farmer does not go unregulated. After the Walkerton Commission of Inquiry,¹²² the province of Ontario passed the

116. R.S.C., ch. P-9 (1985).

117. R.S.C., ch. F-27 (1985).

118. R.S.C., ch. P-10, §§ 5.1, 5.2.

119. R.S.O., ch. E-19, §§ 14(2)(b), 6(2) (1990) (Ont.) (exempting discharges of animal waste in accordance with normal farming practices and the regulations made under the Nutrient Management Act, 2002. R.S.O., ch. 4 (2002) (Ont.)).

120. R.S.O., ch. E-19, § 15(2).

121. *Id.* § 91(4).

122. The Walkerton Commission of Inquiry was established after contamination of drinking water with *E. coli* bacteria that led to seven deaths in Walkerton, Ontario in May of 2000. The problem originated from the infiltration of a town well by bacteria from animal manure. Among the issues considered by Mr. J. O'Connor were methods of protecting drinking water from agricultural sources. DENNIS O'CONNOR, ONTARIO MINISTRY OF THE ATTORNEY GENERAL, REPORT OF THE WALKERTON INQUIRY (2002), available at <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/walkerton/>.

Nutrient Management Act, 2002¹²³ as part of its commitment to province-wide standards to address the potentially harmful effects of agricultural practices on the environment. This legislation sets out a comprehensive and integrated approach to all land-applied materials. This includes the safe disposal of manure, other agricultural wastes, and commercial fertilizers, as well as other bio-solids generated by municipal sewage treatment, septage, and pulp and paper sludge.¹²⁴ The Ontario Ministry of Agriculture bears responsibility for farmer training and review of prepared nutrient management plans, while the Ministry of Environment is responsible for monitoring and enforcement of the regulations.¹²⁵ Thus, a provincial officer or the director may order a person to prevent¹²⁶ as well as remediate¹²⁷ any adverse effect.¹²⁸ In the event of a failure by the polluter or potential polluter to address the problem, the statute outlines extensive powers for remediation by the province and recovery of costs from the polluter,¹²⁹ neither of which precludes a quasi-criminal prosecution of the offender under other provisions within the legislation.¹³⁰

One other notable exception to the “soft-path approach” adopted by agriculture departments across the country is noxious weeds legislation.¹³¹ Motivated by economics, as opposed to environmental concerns, these long-standing provincial statutes impose on land owners or occupiers the duty to remove nuisance weeds from their property to avoid agricultural contamination. Saskatchewan’s Noxious Weeds Act¹³² lists forty-one weed species which may require removal. The Ontario statute lists twenty-three.¹³³ In this sense, the weeds are considered pollutants for which farmers are responsible.

C. Civil Action and the PPP in Agriculture

The torts of nuisance, negligence, strict liability, and trespass also import the PPP into the agricultural community.

123. R.S.O., ch. 4 (2002).

124. *Id.* § 2.

125. CAN. ENVTL. LAW ASS’N, NUTRIENT MANAGEMENT FAQs (Jan. 2004), <http://www.ecolawinfo.org/WATER%20FAQs/Water%20Quality%20and%20Enviro%20Protect/NutMan.htm>.

126. Nutrient Management Act, R.S.O., ch. 4, § 29.

127. *Id.* § 30.

128. *Id.* § 30(2)(c).

129. *Id.* §§ 34-39.

130. *Id.* § 43(1)(c).

131. *See* Weed Control Act, R.S.B.C., ch. 487 (1996) (B.C.); Weed Control Act, R.S.O., ch. W.5 (1990) (Ont.); Noxious Weeds Act, 1984 S.S., ch. N-9.1 (Sask.).

132. Noxious Weeds Act, 1984 S.S., ch. N-9.1.

133. Weed Control Act, R.S.O., ch. W.5.

Nuisance is the unreasonable interference with use and enjoyment of property, causing either physical damage to property or substantial interference with the use and enjoyment of the occupier.¹³⁴ Agricultural activities, such as water and air pollution from pesticides or manure,¹³⁵ soil drift, flies,¹³⁶ rodents, and smell,¹³⁷ have all led to polluter liability pursuant to this tort.

Strict liability, also known as the rule in *Rylands v. Fletcher*,¹³⁸ has also successfully reflected the PPP within the Canadian agricultural context, most notably in cases involving chemical spray drift resulting in crop damage.¹³⁹ In addition, liability for the escape from property of something non-natural which is likely to do mischief if it escapes¹⁴⁰ has also extended to stray animals¹⁴¹ in spite of their seemingly “natural” constitution, but has not included road salt which leached onto agricultural lands.¹⁴²

Trespass, the direct physical entry onto the property of another, has been the subject of litigation relating to aerial spraying in those circumstances where the airplane actually enters the neighbouring property,¹⁴³ once again reinforcing the PPP. The more obvious trespass by cattle has been substantially modified over the years through municipal and provincial legislation.¹⁴⁴

Negligence has also been found vis-à-vis polluting farm activities, including the rather novel finding of negligence in relation to the burning of stubble, which caused reduced visibility on a highway and a consequent multiple-car accident.¹⁴⁵

In spite of the potential application of these torts to agriculture, very few cases apply these torts in Canada, and none specifically reference the PPP in their discussion of liability.

134. See generally BETH BILSON, *THE CANADIAN LAW OF NUISANCE* (1991).

135. *Metson & Metson v. DeWolfe Ltd.*, [1980] 43 N.S.R.2d 221 (N.S. Sup. Ct. (Trial Div.)).

136. *Miller v. Krawitz*, [1931] 2 D.L.R. 784 (Man. K.B.).

137. *Pyke v. Tri Gro Enters. Ltd.*, [2001] 55 O.R.3d 257 (Ont. Ct. App.); see also PUB. LEGAL EDUC. ASS'N, *ENVIRONMENTAL LAW AND THE FARMER* 9 (2000).

138. (1866) 1 L.R. Exch. 265.

139. See *Cruise v. Neissen*, [1978] 82 D.L.R. (3d) 190 (Man. Ct. App.); *Kwasnuik v. Ratke*, [1966] 57 D.L.R. (2d) 269 (Sask. Q.B.).

140. *Rylands*, 1 L.R. Exch. at 265.

141. See *Acher v. Kerr*, [1973] 2 O.R.2d 270 (Ont. County Ct.).

142. *Schenck v. The Queen in Right of Ontario*, [1981] 34 O.R.2d 595 (Ont. High Ct. of Justice).

143. *Bridges Bros. v. Forest Prot. Ltd.*, [1976] 14 N.B.R.2d 91 (N.B. Sup. Ct.).

144. See *Falardeau v. Church*, [1972] 6 W.W.R. 450 (B.C. Sup. Ct.). For legislation, see *Stray Animals Act*, R.S.A., ch. S-20 (2000) (Alta.); *Animal Liability Act*, C.C.S.M., ch. A-95 (1998) (Man.); *Stray Animals Act*, 1978 S.S., ch. S-60 (Sask.).

145. *Lickoch v. Madu*, [1973] 34 D.L.R. (3d) 569 (Alta. Sup. Ct. (App. Div.)).

V. Barriers to the PPP

A. Intensive Livestock Operations

“In Canada, there are more than thirteen million cattle, eleven million pigs, half a million horses and mules, and close to a million sheep and goats.”¹⁴⁶ Over the past twenty years, livestock farming has changed substantially from an industry based on small producers to one dominated by large agri-business ventures known in Canada as intensive livestock operations (ILOs).¹⁴⁷ Within the hog sector alone, Statistics Canada reports that the number of hog farms has decreased by more than 50% during the period 1990-2000. During the same period of time, the number of hogs per farm has almost tripled.¹⁴⁸

Seen as a means of ensuring the long term viability of the rural economy, provincial governments have fostered ILOs through direct financial assistance, support of value added support industries like processing plants, and through legislative enactment.¹⁴⁹

Unfortunately, the environmental concerns associated with this industry have become well known and documented.

In Ontario and Quebec alone, livestock produce a volume of manure equal to the sewage from 100 million people The auditor general of Quebec “found excess spreading [from livestock operations] to the leading source of non-point source pollution” in

146. BOYD, *supra* note 89, at 37 (citing ORG. FOR ECON. CO-OPERATION & DEV., ENVIRONMENTAL DATA COMPENDIUM 1999 EDITION 286 (1999)).

147. Also known as CAFOs in the United States.

148. Edward W. Tyrchiewicz, *Canadian Perspective*, 7 AGRIC. FOOD POL’Y SYS. INFO. WORKSHOP 225, 226 (2002) (citing STATISTICS CANADA, CAT NO. 23-603-UPE, NUMBER OF FARMS REPORTING PIGS AND AVERAGE NUMBER OF PIGS PER FARM (2001)), available at <http://www.farmfoundation.org/teal/tyrchniewicz.pdf>.

149. The province of Saskatchewan typifies the metamorphosis to factory farming. For a discussion of this transition, see Cathy Holtlander, *Living in a Sea of Cheap Grain: The Corporate Conversion of Saskatchewan’s Hog Production Policy*, SASK. NOTES (Canadian Ctr. for Policy Alternatives, Saskatoon, Sask.), Dec. 2002, at 1, 1-4. For a discussion of the relationship between funding of agriculture and environmental sustainability using the province of Quebec as a case study, see Denis Boutin, Presentation at the Sixth Biennial Conference of the Canadian Soc’y for Ecological Econ.: Reconciling Farm Support and Environmental Protection: Trends and Prospects (Oct. 28, 2005), available at <http://www.cansee.org/cdocs/2005/13/DenisBoutin-CANSEECConference-Oct2005.pdf>. For a description of ILO legislation and environmental regulation in Canada (as well as the United States and Mexico), see JERRY SPEIR ET AL., COMM’N ON ENVTL. COOPERATION, COMPARATIVE STANDARDS OF INTENSIVE LIVESTOCK OPERATIONS IN CANADA, MEXICO, AND THE UNITED STATES 53 (2002), available at http://www.ccc.org/files/pdf/LAWPOLICY/CAFOs_en.pdf.

the province. Between 1988 and 1998, there were 274 manure spills in Ontario, including 53 spills that killed fish. Up to one in three Canadian livestock farmers stores liquid manure in unlined lagoons, risking contamination of both surface water and groundwater. . . . Ontario's environmental commissioner concludes, "Environmental laws created when small operations were the norm may not address the associated environmental risks that come with intensive farm operations." Although Canada spends billions of dollars to treat human sewage, the far greater volumes of animal manure produced receive no treatment at all.¹⁵⁰

The regulation of intensive livestock operations in Canada rests with provincial governments.¹⁵¹ At a minimum, the operator of a proposed operation will be required to obtain a building permit from local authorities in order to undertake construction, and in most jurisdictions the departments of agriculture are also kept in the loop with detailed information regarding siting and design of the buildings, manure storage, and manure management proposals.¹⁵² The level of sophistication of such applications and approvals varies from province to province, as does the necessity for separate review and/or approval.¹⁵³

Depending on the province (or sometimes the municipality), the regulation of ILOs in Canada can be found in legislation, regulation, codes of practice, standards, guidelines, and/or recommendations. While legislation, regulation, and bylaws (ordinances in the United States) do have the force of law, guidelines, standards, policies, and codes do not, although they may be incorporated into legislation over time.

Whatever form taken, articulating expectations becomes strong evidence of "normally accepted agricultural practices."¹⁵⁴ An operator who meets formal standards may be able to use such conformance as a defense against civil actions or statutory complaints under "right to farm" legislation, and, in the case of a license or permit, adherence to such approval may also provide the defense of statutory authority. On the other hand, any guideline, legal or otherwise, offers a standard of practice to measure ILO performance and, in

150. BOYD, *supra* note 89, at 37 (footnotes omitted).

151. ONT. MINISTRY OF AGRIC., FOOD & RURAL AFFAIRS, A REVIEW OF SELECTED JURISDICTIONS AND THEIR APPROACH TO REGULATING INTENSIVE FARMING OPERATIONS (June 10, 2003), <http://www.omafr.gov.on.ca/english/agops/otherregs2.htm>; *see also* SPEIR ET AL., *supra* note 149, at 67-69.

152. ONT. MINISTRY OF AGRIC., FOOD & RURAL AFFAIRS, *supra* note 151.

153. SPEIR ET AL., *supra* note 149, at 53.

154. *See infra* note 157; discussion *infra* Part V.B.

terms of the polluter pays principle, helps identify the “polluter” in the process of establishing liability.¹⁵⁵

B. Right to Farm Legislation

“Right to farm” legislation should not be underestimated in its ability to undermine the efficacy of any PPP regime, be it in relation to intensive livestock production or to other forms of agricultural activity. Every Canadian province has enacted these statutes, originally designed to protect family farm operations from the encroachment of urban development.¹⁵⁶ The legislation exempts agricultural operations from liability pursuant to common law nuisance actions — be it private or public nuisance — so long as the operation is in accordance with what are considered normal farming practices.¹⁵⁷ The exact phraseology differs from province to province,¹⁵⁸ as does the definition of the term. The standard of “normalcy,” however, is defined either by government, through statute or regulation, or by the particular agricultural industry itself, according to accepted practices in the trade.¹⁵⁹

Inevitably, the legislation places the burden on those seeking redress from the polluter by reversing the onus to the party claiming a failure to meet the

155. SPEIR ET AL., *supra* note 149, at 93-94.

156. For examples of right to farm legislation, see Agricultural Operation Practices Act, R.S.A., ch. A-7 (2000); Farm Practices Protection Act, C.C.S.M., ch. F 45 (1992) (Man.); Agricultural Operation Practices Act, 1999 C.S.N.B., ch. A-5.3 (N.B.); Farm Practices Act, 2000 S.N.S., ch. 3 (N.S.) (Nova Scotia is unique in that the legislation also protects farmers from negligence claims.); Farming and Food Production Protection Act, 1998 S.O., ch. 1 (Ont.); Farm Practices Act, R.S.P.E.I., ch. F-4.1 (1998) (P.E.I.); An Act Respecting Preservation of Agricultural Lands and Agricultural Activities, R.S.Q., ch. P-41.1 (1996) (Que.).

157. SPEIR ET AL., *supra* note 149, at 93; see also Jonathan J. Kalmakoff, “*The Right to Farm*”: A Survey of Farm Practice Protection Legislation in Canada, 62 SASK. L. REV. 225 (1999).

158. Although the exact phrase differs from province to province, the “normalcy” standard is a common theme. In Saskatchewan, for example, § 2(i) of the Agricultural Operations Act, 1995 S.S., ch. A-12.1 (Sask.), defines normally accepted agricultural practice as an agricultural practice that: (i) is conducted in a prudent and proper manner that is consistent with accepted customs and standards followed by similar agricultural operations under similar circumstances, including the use of innovative technology or advanced management practices in appropriate circumstances; (ii) is conducted in conformity with any standards established pursuant to the regulations; and (iii) meets accepted standards for establishment and expansion.

Id.

159. The issue of what constitutes normally accepted practice has been addressed by Canadian courts. For an enlightening discussion of how that standard is determined (and can change over time), see *Gunby v. Mushroom Producers' Co-op. Inc.* [1999] 31 C.E.L.R. 13 (N.S. Normal Farm Practices Prot. Bd.); *Pyke v. Tri Gro Enters. Ltd.*, [2001] 55 O.R.3d 257 (Ont. Ct. App.).

standard, rather than demanding the operator establish on the balance of probabilities that the practices are within the standard of “normalcy.”¹⁶⁰ Should the plaintiff fail to establish the practices are “not normal,” the operator of the agricultural activity will not be liable in an action in nuisance, and neither injunction nor other order of a court will prevent the operator from carrying on the agricultural operation.¹⁶¹ In other words, the polluter does not pay.

Unfortunately, this legislation has become a sword, as opposed to a shield for certain agricultural operations, particularly the intensive livestock industry. In spite of the existence of what would otherwise be actionable nuisances such as smells, noise, and other health concerns associated with this agri-industry, polluters find themselves able to avoid liability through these statutes.¹⁶² In fairness, the industry does not have complete immunity from civil action, as the operator may still face strict liability, negligence, trespass, or statutory civil action, should they fail to comply with licensing provisions and damages result.¹⁶³ Nonetheless, the existence of right to farm legislation has had a chilling effect on many neighbours negatively impacted by these activities.¹⁶⁴ The original objective of the legislation, to protect the rural operator from the overly sensitive urban intruder, now protects agri-business from rural neighbours and, in many cases, undermines the application of the PPP.

In spite of the support lent to this industry by provincial governments through legislative and other means, the courts have vigilantly reviewed farm practices.¹⁶⁵ Recognizing that “right to farm” legislation clearly erodes the common law understanding of nuisance and the scope of real property rights,

160. By way of example, the Saskatchewan legislation reads:

The onus of proving that the agricultural operation is causing nuisance arising from practices that are not consistent with normally accepted agricultural practices lies on the plaintiff or claimant where the plaintiff or the claimant in an action or proceeding against an operator claims:

- (a) damages in nuisance with respect to the agricultural operation; or
- (b) an injunction or other order preventing the continuing operation of the agricultural operation on the grounds of nuisance.

1995 S.S., ch. A-12.1, § 4.

161. *See, e.g., id.* § 3(1).

162. For a discussion of the issues associated with ILOs from those opposed to the practice, see Welcome to Manitoba Hogwatch, <http://www.hogwatchmanitoba.org> (last visited Jan. 31, 2006).

163. That is, the legislation only provides “immunity” nuisance action and does not act as a bar to other commonlaw tort actions. *See supra* Part IV.2.C.

164. Telephone Interview with Cathy Holtslander, Project Organizer for Beyond Factory Farming, Council of Canadians, in Saskatoon, Sask. (Mar. 27, 2006).

165. *See supra* note 159.

the Ontario courts in particular have interpreted right to farm legislation so as to prevent running roughshod over both.

For example, in the recent case of *Pyke v. Tri Gro Enterprises Ltd.*¹⁶⁶ Mr. Justice Sharpe for the majority stated:

This Act represents a significant limitation on the property rights of landowners affected by the nuisances it protects. By protecting farming operations from nuisance suits, affected property owners suffer a loss of amenities, and a corresponding loss of property value. Profit-making ventures, such as that of the appellants, are given the corresponding benefit of being able to carry on their nuisance creating activity without having to bear the full cost of their activities by compensating their affected neighbours. While the Act is motivated by a broader public purpose, it should not be overlooked that it has the effect of allowing farm operations, practically, to appropriate property value without compensation.

It is, of course, open to the legislature to limit individual rights of property in order to achieve some broader social objective. On the other hand, it is a well-established principle of statutory interpretation that if legislation is inconclusive or ambiguous, the court may properly favour the protection of property rights.¹⁶⁷

Although not explicit, the PPP ultimately prevailed.

C. Farm Groups and the PPP

Several Canadian agricultural producer organizations, including the Christian Farmers Federation of Ontario (CFF)¹⁶⁸ and Keystone Agricultural Producers (KAP),¹⁶⁹ seek financial compensation for good stewardship. Unlike the “provider gets” where the farmer receives compensation for the provision of environmental services that improve the environment beyond the standard of good farming practices,¹⁷⁰ the Alternate Land Use Services (ALUS) model which they propose also compensates farmers for non-polluting activities;¹⁷¹ in other words “a non-polluter is paid” principle.

166. [2001] 55 O.R.3d 257 (Ont. Ct. App.).

167. *Id.* ¶¶ 75-76 (citation omitted).

168. Christian Farmers Federation of Ontario, <http://www.christianfarmers.org> (last visited Jan. 31, 2006).

169. Keystone Agricultural Producers, <http://www.kap.mb.ca/contents.htm> (last visited Jan. 31, 2006).

170. For a discussion of the “provider gets principle” within the EC and U.S. agricultural context, see Grossman, *supra* note 8, at 4, 19, 36-37, 48-50.

171. Alternate Land Use Services (ALUS) (Payments for Environmental Goods and Services), A Policy of the Christian Farmers Federation (Christian Farmers Federation of

So, for example, efforts to “[r]eplenish and purify water supplies by enhancing wetlands, planting vegetation along streams and fencing livestock out of at-risk water supplies” would, under the CFF alternate land use model, be considered a “deliverable” worthy of “environmental payment.”¹⁷² While some of the suggested deliverables do reflect the provider gets approach, it is arguable that planting vegetation along streams and fencing livestock to prevent degradation of water supplies are examples of good farming practices and preventative measures within the purview of the PPP. Similarly, the annual “qualifying practices” for compensation proposed by KAP fall within good management practices and, if not followed as a baseline, should trigger the polluter pays principle if environmental degradation results. These annual qualifying practices set out by KAP are:

- i) Grazing Management: Use of rotational practices reduces stocking pressure on tame and native pastures resulting in better waterfowl and wildlife cover.
- ii) Green Manure Crops: The use of biennial or short term perennial legume crops has good soil improvement [and] also has positive wildlife benefits. Even annual crops can be used as green manure crops.
- iii) Residue Management: Management of land to enhance crop residue and use of winter annuals have many positive benefits for soil and water conservation.¹⁷³

The supporters of ALUS argue that Europe and the United States already support their rural communities based on the “policy rationale of paying farmers for their provision” of ecological services.¹⁷⁴ Canadian farmers have been left to compete without such support. In their view, domestic agricultural issues are becoming dominated by the environmental agenda, as the urbanites increasingly demand “new products” like “cleaner water and pastoral landscapes . . . from rural producers,”¹⁷⁵ all without government-supported resource adjustment and related rural income enhancement programming.

Ontario, Guelph, Ontario), Sept. 28, 2005, http://www.christianfarmers.org/sub_policies_and_issues/policy_alus_sept_2005.pdf.

172. *Id.* at 3.

173. KEYSTONE AGRIC. PRODUCERS, ALTERNATE LAND USE SERVICES (ALUS): BROADENING THE BASE OF AGRICULTURAL INCOME 6, *available at* http://www.kap.mb.ca/policy_alus.pdf.

174. *Id.* at 1.

175. *Id.*

“Implementing [ALUS] would recognize the societal benefits from agriculture beyond the traditional commodities”¹⁷⁶

Although the specific objectives of alternate land use services are laudable, including: conservation and environmental enhancement, such as greenhouse gas (GHG)/carbon sequestration; sustainable rural communities; and agricultural income enhancement and adaptation, the membership maintains that any and all such programs must be voluntary and based on incentives acceptable to the individual landowner.¹⁷⁷

ALUS is not to be dismissed out of hand: some of the proposals do reflect the provider gets approach. However, the non-polluter is paid model does run contrary to the PPP and undermines both policy and legal efforts by government and other producer-based organizations who support the latter objective.

VI. The Future of the Polluter Pays Principle in Canada

The recognition and infusion of the PPP in Canadian agriculture has been slow, but two recent initiatives give reason for optimism. The first is the coupling of pollution prevention programs (to minimize the need for control and remediation) with financial incentives for successful stewardship. The second is a current legal action, partially based on the PPP, which is receiving both national and international attention.

A. Environmental Farm Planning (EFP) Initiatives

In 2001 the “federal, provincial, and territorial governments [began] working with the agricultural and agri-food industry to help strengthen and revitalize the sector” through [the development of an] Agricultural Policy Framework (APF)”¹⁷⁸ The framework involves “five key elements” including environment, business risk management, food safety and quality, renewal, and science and innovation.¹⁷⁹ All are designed to assist Canadian agriculture in the development of new international markets. The signatories to APF have since completed Implementation Agreements with the federal Government.¹⁸⁰

176. *Id.* at 2.

177. *Id.* at 2-5, 6.

178. *Putting Canada First*, AGRI-INFO (Agric. & Agri-food Can.), Mar. 2003, at 1, 1, available at http://www.agr.gc.ca/cb/apf/pdf/bull_2003v01_01_e.pdf.

179. *Id.*

180. In addition, all provinces and territories have agreed to Terms of Reference for an APF Review Panel, which will assess progress on objectives articulated in the Framework. *See* AGRIC. & AGRI-FOOD CAN., *THE AGRICULTURAL POLICY FRAMEWORK (APF)* (Feb. 7, 2006), http://www.agr.gc.ca/cb/apf/index_e.php.

The APF environment component identifies soil, water, air, and biodiversity as the main areas requiring the attention of agricultural producers and actively promotes management practices that enhance stewardship on the farm.¹⁸¹ The anticipated results are reduction of agricultural risks and provision of benefits to each of the component areas.¹⁸²

Specific environmental problems are listed as “key priorities” including: “health and supply of water,” erosion, “soil organic matter,” “particulate emissions, odours,” and habitat availability.¹⁸³ Having established the nature of the problem, the Framework continues:

24.2 The Parties agree to work, in collaboration with the agriculture sector and other stakeholders, towards the achievement of the following common farm environmental management goals:

24.2.1 the completion of a basic agri-environmental scan on all farms so as to identify farms and regions requiring corrective action;

24.2.2 the completion of an agri-environmental farm plan or participation in an equivalent agri-environmental plan for all farms identified as requiring significant corrective action under the basic agri-environmental scan referred to in clause 24.2.1; and

24.2.3 the implementation of agri-environmental farm plans or equivalent agri-environmental plans and improved stewardship through the adoption of environmentally beneficial practices, as appropriate to the needs and circumstances of individual farms or regions, in the following areas:

Nutrient Management . . .

Pest Management . . .

Land and Water Management . . .

Nuisance Management . . .

*Biodiversity Management . . .*¹⁸⁴

Interestingly, the Framework makes all of these goals voluntary.¹⁸⁵

181. AGRIC. & AGRI-FOOD CAN., PUTTING CANADA FIRST: AN ARCHITECTURE FOR AGRICULTURAL POLICY IN THE 21ST CENTURY 2, 3 (2005), available at http://www.agr.gc.ca/cb/apf/index_e.php?section=info&group=consult&page=consult1_03.pdf.

182. Federal-Provincial-Territorial Framework Agreement on Agricultural and Agri-food Policy for the Twenty-First Century § 24.1, June 2004, available at http://www.agr.gc.ca/cb/apf/pdf/accord_e.pdf.

183. *Id.*

184. *Id.* § 24.2.

185. *Id.* § 24.3.

To further these goals, the parties agree to support the development and use of agri-environmental scans and agri-environmental farm plans.¹⁸⁶ The province of Ontario has since committed \$67.66 million to support producers with the implementation and development of EFPs in that province and to provide an incentive program “to help producers more quickly adopt the environmentally beneficial actions needed to reduce the risks and enhance the benefits identified in the plans.”¹⁸⁷ The other provinces and territories have made similar commitments.¹⁸⁸

Similarly, the federal government has quickly moved beyond the implementation agreements, establishing the National Environmental Farm Planning Initiative (NEFPI) and the National Farm Stewardship Program (NFSP) to provide the technical and financial support to follow up on individual plan recommendations and ensure that beneficial management practices are adopted within agriculture. Producers who complete a government-reviewed EFP are eligible to apply for financial and technical assistance through provincially¹⁸⁹ delivered programs.¹⁹⁰ A maximum of

186. *Id.* § 24.2. A

“basic agri-environmental scan” means a tool used to identify those farms requiring corrective environmental action, based on a preliminary examination of key agricultural factors that may pose environmental risks or provide benefits to air, soil, water, and biodiversity; an “agri-environmental farm plan” means a process: a) used to conduct a systematic and comprehensive assessment that identifies all actual and potential environmental risks and benefits from agricultural operations, and b) used to develop a plan of action to mitigate priority risks and realize benefits, and c) will include independent review and documentation covering progress and data on implementation.

Id. § 23.1.

187. AGRIC. & AGRI-FOOD CAN., *BACKGROUND: HIGHLIGHTS OF THE CANADA-ONTARIO IMPLEMENTATION AGREEMENT* (Mar. 23, 2006), http://www.agr.gc.ca/cb/index_e.php?s1=b&s2=2003&page=n31211b.

188. See the federal-provincial and federal-territorial agreements at http://www.agr.gc.ca/cb/apf/index_e.php?section=info&page=frame.

189. “Funding levels and criteria for each [programme] can vary from province to province. Federal incentive levels also vary between . . . categories. Federal cost share levels are either 30% or 50% and maximum project funding limits apply to each . . . category.” AGRIC. & AGRI-FOOD CAN., *THE NATIONAL FARM STEWARDSHIP PROGRAM* (Aug. 9, 2005), http://www.agr.gc.ca/env/efp-pfa/index_e.php?page=nfsp-pnga.

190. Take up on the program has been very positive. In Saskatchewan for example, since its inception this past spring, just over 650 environmental farm plans have been approved for funding. The goal is to approve 6000-7000 projects by the end of the funding period in March 2008. To date, over 1300 producers have taken part in the first planning workshops. Bruce Cochrane, *Environmental Farm Plan Program Well Accepted By Saskatchewan Farmers*, *FARMSCAPE*, Sept. 7, 2005 (Episode 1905), http://archives.foodsafetynetwork.ca/animalnet/2005/9-2005/animalnet_sept_7.htm#story1.

\$30,000 in federal funding over the life of the NFSP is available to each operator.¹⁹¹

According to the manager of the federal agricultural stewardship program, environmental farm planning has now become an integral part of the Agricultural Policy Framework objective “to confirm . . . Canada’s role as a world leader in environmentally responsible agriculture.”¹⁹² As a result, the preventative aspect of the PPP should become the norm across Canada, involving the federal and provincial governments, farm organizations, and individual operators.

The benefits of EFPs and best management practices in agriculture have also manifested themselves in agri-finance; private financial institutions are demanding the completion of increasingly sophisticated environmental site assessments to determine risk prior to financing decisions. Quite simply, agricultural producers who fail to ensure the long term environmental viability of their operations, or who might already fall within the category of “polluter,” will fail to receive financing.¹⁹³ Although legislative protection may be available for lending institutions to limit their own liability should the secured property be contaminated,¹⁹⁴ these lenders are understandably careful to make certain the real property will have mortgage value.

Whether direct or indirect, carrot or stick, the financial implications associated with bad environmental practices are leading to changes at the farmyard level. Either farmers pay to remediate environmental problems, or

191. AGRIC. & AGRI-FOOD CAN., NATIONAL FARM STEWARDSHIP PROGRAM (NFSP) (Nov. 24, 2005), http://www.agr.gc.ca/progser/ps_nfsp_e.phtml.

192. Jim Tokarchuk, *Foreword* to AGRIC. & AGRI-FOOD CAN., ENHANCED ENVIRONMENTAL FARM PLAN FOR PRINCE EDWARD ISLAND (2004).

193. In the case of a major Canadian bank, an Environmental Inspection Report must be prepared once a year for loans over \$250,000. EIRs are not required for loans under \$100,000. With loans over \$100,000 and up to \$250,000, an EIR is completed only at the time of application, unless there is a change in circumstances. According to the bank, the impetus for these requirements was a due diligence requirement under legislation. The first level EIRs are completed by the bank’s agriculture department. If there is a risk involved or suspected, the bank will request a level II evaluation from a third party. If the property is a “family farm” in the traditional sense, a level II evaluation is rarely required; it is, however, common to Agri-business operations. Telephone Interview with Leo Zyerveld, Regional Agriculture Manager, Prairie Region, Canadian Imperial Bank of Commerce, in Calgary, Alta. (Sept. 1, 2005).

194. *See, e.g.*, Environmental Management Protection Act, 2002 S.S., ch. E-10.21, § 2(w)(viii) (Sask.) (excluding from the definition of a “person responsible for a discharge” a “secured creditor . . . unless the secured creditor participated in the day-to-day management or control of the land or through an act or omission caused the discharge or aggravated an existing adverse effect”).

they anticipate and prevent pollution through planning and management practices and receive positive incentives for their actions.¹⁹⁵

B. Civil Action

Just as the snail in the ginger beer introduced manufacturers to consumer liability,¹⁹⁶ so too the Canadian case of *Hoffman v. Monsanto Canada Inc.*¹⁹⁷ will force agri-business, and perhaps individual farmers, to recognize the liabilities associated with adverse environmental impacts and the polluter pays principal. The case illustrates the legal avenues, both common law and statute based, available to bring the PPP to the farmyard.¹⁹⁸ Its significantly high profile will ensure that the ruling will receive attention both within Canada and abroad.

Hoffman and Beauboin, the nominal plaintiffs in this case, are certified organic farmers residing in Saskatchewan who represent the Saskatchewan Organic Directorate (SOD), a group of some 1000 organic grain farmers registered between 1996-2001.¹⁹⁹ They are suing Monsanto, Canada, and Bayer Cropscience Inc.²⁰⁰ for damages associated with “the extensive GMO [genetically manufactured organism] contamination of canola by genes introduced into the environment.”²⁰¹ They also seek an injunction to prevent the unconfined commercial release of genetically manufactured (GM) wheat.²⁰²

The defendants introduced GM canola into the Canadian market after receiving approval for its unconfined release from the Canadian Food Inspection Agency in 1995.²⁰³ Because both Roundup Ready (Monsanto) and Liberty Link (Bayer) varieties of canola are open pollinated, cross pollination occurred with non-GM canola.²⁰⁴ This cross pollination, coupled with the reproduction of progeny as volunteers, spread the GM product beyond the

195. Interview with Darlene Sanford, President, PEI Cattlemen’s Association, in Mont-Carmel, P.E.I. (Aug. 8, 2005).

196. Donoghue v. Stevenson, [1932] A.C. 562 (H.L.) (appeal taken from Scot.) (U.K.).

197. [2005] 264 Sask. R. 1 (Sask. Q.B.).

198. For a thorough discussion of the causes of action, see Jane Matthews Glenn, *Genetically Modified Crops in Canada: Rights and Wrongs*, 12 J. ENVTL. L. & PRAC. 281 (2003).

199. Certification for the class is sought pursuant to the provincial Class Actions Act., 2001 S.S., ch. C-12.01 (Sask.).

200. Formerly Aventis Cropscience Canada Holding Inc. See also BAYER, ANNUAL REPORT 2002, available at <http://www.bayer.com/annualreport2002/subgroups/cropscience1.html>.

201. *Hoffman*, [2005] 264 Sask. R. ¶ 39 (citing The Statement of Claim in the Court of Queen’s Bench, Judicial Centre of Saskatoon ¶¶ 43-44, available at <http://www.saskorganic.com/oapf/pdf/stmt-of-claim.pdf>).

202. See *id.* ¶ 24.

203. *Id.* ¶ 9.

204. *Id.* ¶ 11.

property of original cultivation.²⁰⁵ As a result, organic farmers in the province can no longer guarantee that canola grown as “organic” is free from GM canola seed contamination. Canola as an organic crop has been lost to certified organic farmers as neither the domestic nor the foreign market accept products which cannot be warranted as free of GMO contamination.²⁰⁶

The defendants ground their common law claims in negligence, nuisance, the rule in *Rylands v. Fletcher*,²⁰⁷ and trespass.²⁰⁸ They also claim damages pursuant to statutory civil actions within the now-repealed Environmental Management and Protection Act,²⁰⁹ the Environmental Management and Protection Act, 2002,²¹⁰ and the province’s Environmental Assessment Act.²¹¹

The first hurdle for the plaintiffs was to establish the certified organic farmers group as a “class” within the meaning of the Saskatchewan Class Actions Act.²¹² The certification hearing, held in the fall of 2004, addressed five questions:

1. Do the pleadings disclose a cause of action?
2. What are the common issues between the members of the class?
3. Is there an identifiable class of persons?
4. Is class action the preferable procedure for the resolution of the common issues?
5. Is the representative plaintiff appropriate?²¹³

Mme Justice Smith’s decision of May 11, 2005,²¹⁴ “provide[d] a detailed analysis of the certification process under Saskatchewan’s class action regime and guidance as to how the Saskatchewan courts will approach certification applications.”²¹⁵ Although the discussion on issues two through five offered considerable guidance on class actions,²¹⁶ of greater importance in determining

205. *Id.*

206. *Id.* ¶ 19 (citing Statement of Claim, *supra* note 201, ¶¶ 26-27). The injunction vis-à-vis GMO wheat seeks to limit the unconfined release of that seed for fear of a similar result. Statement of Claim, *supra* note 201, ¶¶ 30-31, 45.

207. (1866) 1 L.R. Exch. 265.

208. *Hoffman*, [2005] 264 Sask. R. ¶¶ 125-33.

209. Environmental Management and Protection Act, 1983-84 S.S., ch. E-10.2 (Sask.).

210. *Id.* ch. E-10.21.

211. *Id.* ch. E-10.1.

212. Class Actions Act, 2001 S.S., ch. C-12.01 (Sask.).

213. *Id.* § 6.

214. *Hoffman v. Monsanto Can. Inc.*, [2005] 264 Sask. R. 1 (Sask. Q.B.).

215. Ogilvy Renault, L.L.P., A Rigorous Approach to Certification — The Saskatchewan Experience, June 30, 2005, <http://www.ogilvyrenault.com/en/ResourceCenter/ResourceCenterDetails.aspx?id=993&pId=53>.

216. Mme Justice Smith held that the plaintiffs failed to satisfy any of these criteria.

the direction of the PPP in Canada was her treatment of the first question: whether the statement of claim disclosed a cause of action.²¹⁷

Mme Justice Smith addressed each of the substantive causes of action before concluding that the pleadings did not disclose a reasonable cause of action in relation to negligence, strict liability, nuisance, and trespass.²¹⁸ She held that only the statutory actions under the EMPA 2002 and the EAA disclosed reasonable causes of action.²¹⁹ She reached this conclusion in spite of the widely accepted “plain and obvious test” applied to such determinations as set out in *Hunt v. Carey Canada Inc.*²²⁰ This text requires that, presuming the alleged facts are true, it is plain and obvious that a cause of action exists. It does not necessitate consideration of the merits of the action, only that a cause of action exists following a “generous” reading of the Statement of Claim.²²¹ In spite of this seemingly low threshold, Mme Justice Smith was unable to find a reasonable cause of action.

Because many of the claims “[were] at least in some respect novel”²²² and required expansion of the doctrine at issue, Mme Justice Smith held it was within her jurisdiction to determine whether any such novel claim had “a reasonable prospect for success.”²²³ On this basis, the common law actions were untenable.

On August 30, 2005, Mr. Justice Cameron of the Saskatchewan Court of Appeal granted leave to appeal.²²⁴ In granting leave, Mr. Justice Cameron

217. For a more detailed discussion of the decision, see Martin Z. P. Olszynski, *Hoffman v. Monsanto Canada Inc.: Looking for a Generous Approach to the Elephant in the Garden*, 16 J. ENVTL. L. & PRAC. 53 (2005); Randy Sutton, *A Rigorous Approach to Certification — The Saskatchewan Experience: Case Comment on Hoffman v. Monsanto Canada Inc.*, LAW. WKLY., July 8, 2005, at 8; Ogilvy Renault, L.L.P., *supra* note 215.

218. *Hoffman*, [2005] 264 Sask. R. ¶ 194. Her determination with regard to nuisance was “subject only to the very remote possibility that the claim can be linked to a failure on the part of the defendants to comply with the environmental protection requirements of the EMPA, 2002 of the EAA.” *Id.* J. Smith was of the view that, in such a case, an action in common law nuisance would be entirely redundant. *Id.*

219. For a discussion of the possible role of EMPA & EMPA, 2002 in furthering the claims of organic farmers, see Jodi McNaughton, *GMO Contamination: Are GMOs Pollutants Under the Environmental Management and Protection Act?*, 66 SASK. L. REV. 183 (2003).

220. [1990] 2 S.C.R. 959, 980 (Can.), *cited in Hoffman*, [2005] 264 Sask. R. ¶ 27.

221. *Hoffman*, [2005] 264 Sask. R. ¶ 28 (citing WARD BRANCH, CLASS ACTIONS IN CANADA 4-1 to 4-2 (Canada Law Book Inc., 2004) (1996)).

222. *Id.* ¶ 36.

223. *Id.*

224. *Hoffman v. Monsanto Can. Inc. (Hoffman II)*, [2005] 17 C.E.L.R.3d 139 (Sask. Ct. App.); *see also* Media Release, Sask. Organic Directorate, *Organic Farmers Granted Leave to Appeal Class Certification Decision* (Aug. 30, 2005), *available at* <http://www.saskorganic.com/oapf> (follow “30 August, 2005 — Leave to appeal granted Press Release” hyperlink).

stated, “the proposed appeal raises some comparatively new and potentially controversial points of law, that it transcends the particular in its implications, and that it is of sufficient importance to the practice pertaining to this subject to warrant attention by this Court.”²²⁵

Clearly the issue of liability for GM products offers ample fodder for legal debate regarding the scope and application of our common law causes of action. Whether *Hoffman* proves to be the vehicle for broadening the scope of any of these torts remains to be seen. Recent intervener activity, however, would suggest that the “novel” issues which Justice Smith addressed in her Queen’s Bench decision, may become the focal point of appeal.²²⁶ The social justification for extending the parameters of these torts could be partially rooted in the polluter pays principle. If, for example, the unreasonable interference with use and enjoyment of property contemplated in nuisance can extend to the “contamination” of the GM canola, the PPP will be re-enforced within the agricultural sector. Mme Justice Smith acknowledged that the test for what constitutes a nuisance is “notoriously vague and changes over time.”²²⁷ Indeed, case law has shown that the doors of nuisance are never closed, expanding into areas like interference with broadcast signals²²⁸ and vibration.²²⁹ The willingness of the Court to consider the nuisance claim as novel yet arguable may introduce the PPP to agricultural enterprises engaged in GM production. Similar policy arguments can be made with regard to *Rylands v. Fletcher*, negligence, and, to a lesser degree, trespass. Whether the policy arguments will tip the scales is debatable as substantial difficulties remain.²³⁰ However, at a minimum, the debate may inspire change to incorporate the PPP into agricultural activities in a more comprehensive way.

225. *Hoffman*, [2005] 17 C.E.L.R.3d 139 ¶ 16. The majority of Mr. Justice Cameron’s decision discussed the standard applied by Mme Justice Smith to the certification application and determined that the issue of rigour warranted consideration by the Court of Appeal. *Id.* ¶¶ 1-15.

226. Interview with confidential source (Dec. 8, 2005).

227. *Hoffman*, [2005] 264 Sask. R. ¶ 108.

228. *Nor-Video Serv. Ltd. v. Ont. Hydro*, [1978] 84 D.L.R. (3d) 221 (Ont. Sup. Ct., High Ct. of Justice).

229. *Mandrake Mgmt. Consultants Ltd. v. Toronto Transit Comm’n*, [1993] 102 D.L.R. (4th) 12 (Ont. Ct. App.).

230. For example, although Mme Justice Smith endorses the proposition that the creator of the nuisance (in our scenario the “polluter”) need not necessarily be in occupation of the land from which the nuisance emanates nor exhibit independent malfeasance in order to face liability, she held that, at a minimum, direct causation of damage must be alleged. In this case, there were no facts alleging that the defendants substantially caused the nuisance alleged. As a result the cause of action was untenable. *Hoffman*, [2005] 264 Sask. R. ¶ 122.

VII. Conclusion

Although accepted by the Supreme Court of Canada and within the Canadian psyche, the PPP is not a principle which is fully operational in the farmyard. This is attributable to:

- the lack of private actions against farm-based polluters;
 - the general reluctance of public prosecutors to enforce environmental legislation and pursue polluters within the agricultural sector;
 - barriers presented by legislation which have discouraged private action;
- and
- the policies and programs of departments of agriculture which have promoted a cooperative and proactive approach to pollution prevention as opposed to pollution abatement within agriculture.

In spite of Canada's history, the incorporation of the polluter pays principle into agricultural law will not come easily, but it will come. The impetus will stem from within. At present, fledgling efforts from government through environmental legislation and agricultural sustainability initiatives are changing the culture within the agricultural sector. These efforts are supplemented by the efforts of individuals involved in environmental farm planning and other legal and non-legal initiatives which are pushing the PPP forward. Be it common law tort, statutorily based rights to civil action, or the vocal opposition against those who fail to recognize and meet their responsibilities under the PPP, individuals are taking polluters to task. Positive reinforcement from financial institutions and government rewards the enlightened majority within the agricultural sector who promote the PPP as the new agricultural reality. The psyche is changing, from both the bottom up and the top down.